Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NICHOLAS SERBEN,
Petitioner,

v.

INTER-CITY MANUFACTURING CO., INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. When an employer offers employment to an applicant to replace a discrimination claimant three months after terminating the claimant, may that offer of employment serve to satisfy the element of the *McDonnell Douglas v. Green* scheme for making a prima facie case that the claimant show that he/she was replaced by a younger worker.

2. When a plaintiff denies that his employment was terminated because of a reduction in force (RIF), produces evidence that the total number of employees did not change, presents evidence proving the traditional elements of a prima facie case and presents credible evidence that the stated reason for termination was mere pretext, fabrication and untruthful, may the court nonetheless require the additional showing of specific direct or circumstantial evidence that age was a determining factor, which is required in RIF case, in order to submit the case to the jury.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Nicholas Serben, respectfully prays that the Court issue its writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above proceedings on November 7, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 36 F.3d 765 (8th Cir. 1994) and is reproduced in the Appendix at page A-2, infra.

The memoranda decisions of the United States District Court for the Eastern District of Missouri (Perry, U.S.M.J.) have not been reported. They are reproduced in the Appendix at page A-6, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered on September 30, 1994, reversing the judgment and order of the United States District Court for the Eastern District of Missouri, issued pursuant to the Age Discrimination in Employment Act (ADEA), Title 29 United States Code, Sections 621, *et seq.* (1990). The United States Court of Appeals for the Eighth Circuit denied Petitioner's timely filed Petition for Rehearing and Suggestion for Rehearing En Banc on November 7, 1994. A copy of that order is reproduced in the Appendix at Page A-1, infra. This Petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)) and Rule 20.1 of the Rules of the Court.

STATEMENT OF THE CASE

Respondent (Inter-City) terminated Petitioner (Mr. Serben) in February, 1991. Mr. Serben, then aged 52, had been employed by Inter-City for nine months. Prior to his employment by Inter-City, Mr. Serben worked for Loose Leaf Metals, Co., as a sales representative to Inter-City. The senior managers at Inter-City knew Mr. Serben because of Inter-City's business dealings with Loose Leaf. Inter-City hired Mr. Serben to train as a sales manager. In the period from three to six months after hiring Mr. Serben, Inter-City lost three key accounts which represented thirteen percent (13%) of its gross sales. The accounts were lost for reasons unrelated to Mr. Serben. However, after the loss of these accounts, the top executives voted to pay themselves bonuses equalling thirty-six percent (36%) of the income from

operations for that year. These same executives claimed at trial that the termination of Mr. Serben was necessary because of the loss of the accounts. In the quarter before terminating Mr. Serben, during the period of cost-cutting, Inter-City hired at least one sales representative. Mr. Serben also ceased actively seeking a replacement for another vacant sales representative position and performed those duties himself during that same period.

After learning of the termination, Mr. Serben requested that Inter-City permit him to remain as a sales representative, performing the tasks he was performing already, at a lower salary. Inter-City refused this request. Within three months, Inter-City offered a sales representative position to a younger applicant.

At trial, the parties agreed that Mr. Serben satisfied the first three of the four requirements for a prima facie case of employment discrimination, as set out by the Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The parties disputed whether or not Mr. Serben established the fourth requirement. For its nondiscriminatory justification, Inter-City claimed that a loss of accounts required it to terminate Mr. Serben. Mr. Serben offered evidence that the proffered reason was mere pretext and that Inter-City's senior managers testified untruthfully. Mr. Serben never fully assumed the duties of the sales manager position. He performed the work of a sales representative as part of the planned three year process of training him for the sales manager position. When it terminated Mr. Serben, Inter-City had available a sales representative position for which it interviewed applicants. It offered it to a younger applicant, at the same time it informed Mr. Serben that it had no positions available.

The jury found in favor of Mr. Serben on the issue of discriminatory discharge and for Inter-City on Mr. Serben's claim of intentional violation of the ADEA. The jury awarded a sum for back pay based on the sales representative position. Inter-City moved for judgment as a matter of law (JAML),

pursuant to Rule 50(a) of the Federal Rules of civil procedure. The district court heard additional evidence after dismissing the jury, denied Inter-City's motion and entered judgment for Mr. Serben on the jury's verdict, and awarded him front pay and attorney's fees. The U.S. Court of Appeals for the Eighth Circuit reversed the District Court's denial of Inter-City's JAML motion.

REASONS FOR GRANTING WRIT

1. **When an employer offers employment to an applicant to replace a discrimination claimant three months after terminating the claimant, may that offer of employment serve to satisfy the element of the *McDonnell Douglas v. Green* scheme for making a prima facie case that the claimant show that he/she was replaced by a younger worker.**

Mr. Serben's evidence showed that he was replaced by a younger worker. The other elements of a prima facie case under *McDonnell Douglas v. Green* were not in dispute. Inter-City argued to the courts that Mr. Serben's replacement did not commence work until six months after his termination. The conclusion by the United States Court of Appeals for the Eighth Circuit which supports Inter-City's argument, establishes a precedent contrary to those of this Court and contrary to the purpose of the ADEA.

For the several months preceding his termination, Mr. Serben worked primarily as a sales representative. After the loss of the two large accounts and the payment of bonuses, four months before Inter-City terminated Mr. Serben there were ten management/sales employees. With the hiring of a sales person three months before his termination, there were eleven such employees. Within three months of terminating Mr. Serben, Inter-City offered employment to a sales representative applicant, younger than Mr. Serben. Hiring of this worker would have restored the number employees to eleven. It was only because the applicant requested a delay in her start date that she did not start at the time of the job offer. A senior manager met her at a local restaurant and requested that she delay her start date for an additional week because of a pending lawsuit. Mr. Serben's claim was the only lawsuit pending involving Inter-City. That week, Inter-City's President signed an affidavit on behalf of the corporation, as part

of its response to the Equal Employment Opportunity Commission's (EEOC) request for a reply to Mr. Serben's complaint. The affidavit included a statement that no sales personnel had been hired as of the date of the affidavit, since before Mr. Serben's termination. The new sales representative started work the next week. Mr. Serben therefore submitted facts showing that Inter-City manipulated its new hiring because of his discrimination claim.

Inter-City argued that the subsequent hiring, even if the new employee replaced Mr. Serben in the duties he performed at the time of termination, would not satisfy the requirement that show that he was replaced by a younger worker since the new hire did not actually start at the time of Mr. Serben's termination. This Court has not addressed the point raised by such a position. A determination by the Court of what constitutes a replacement of a dismissed employee is crucial to the orderly implementation of the ADEA.

Mr. Serben suggests that when an employer offers employment to a younger worker with the intention that the younger worker replace the plaintiff, presuming the other elements are shown, plaintiff makes a prima facie case. Short of a requirement of proof that the employer terminated the plaintiff so that it could hire a specific younger individual, which few ADEA plaintiff's could produce, there must be some guidance of what factors may be considered in determining if a later-hired worker actually replaced the plaintiff. Absent some consideration of future hires, as opposed to only hiring contemporaneous with the termination, a plaintiff would never be able to make a prima facie case. Furthermore, any rule requiring plaintiff to prove discrimination with direct evidence in addition to showing that plaintiff was replaced by a younger worker would make hollow the *McDonnell Douglas* scheme of analysis.

Inter-City contended and the Court of Appeals agreed that Mr. Serben's job was eliminated, and therefore there was a reduction in force. Mr. Serben's evidence showed that there was not a reduction in force. This was a factual question reserved for the jury. The jury returned a verdict for Mr. Serben. The decision of the Court of Appeals establishes a precedent contrary to that established by *McDonnell Douglas*. Based on *McDonnell Douglas*, the courts should apply the adaptable and not inflexible scheme which includes (1) the four factors for making a prima facie case, (2) the offer of a non-discriminatory reason by the employer, and (3) the rebuttal by the employee with evidence that either the proffered reason was mere pretext, or direct or circumstantial evidence that age was a motivating factor in the termination.

Since Mr. Serben's evidence proved that he was in fact replaced by a younger worker, he made a prima facie case. Inter-City's proffered reason for the termination was shown to be mere pretext, fabrication and untruthful. Therefore, Mr. Serben made a submissible case and the jury's verdict should have been permitted to stand. The Court of Appeals establishes a rule of law that will bar recovery by a significant number of victims of insidious discrimination. The precedent of the Court of Appeals will also serve as a guideline for employers to circumvent the ADEA by delaying the hire of a replacement worker for a short period of time after the termination of the older worker. This frustration of the purpose of the ADEA should not be permitted.

2. **When a plaintiff denies that his employment was terminated because of a reduction in force (RIF), produces evidence that the total number of employees did not change, presents evidence proving the traditional elements of a prima facie case and presents credible evidence that the stated reason for termination was mere pretext, fabrication and untruthful, may the court nonetheless require the additional showing of specific direct or circumstantial evidence that age was a determining factor, which is required in RIF case, in order to submit the case to the jury.**

The decision by the United State Court of Appeals for the Eighth Circuit frustrates the purpose of the ADEA and creates a burden of proof which will prevent a large percentage of victims of employment discrimination from recovery for their damages and brings to the fore an issue germane to a large portion of employment discrimination litigation which has not been addressed by the Court.

Neither the district court nor the parties treated the case as a RIF case. The Eighth Circuit applied its more stringent standard for such cases, which was not applied by the district court, the parties or the jury. In place of a showing that plaintiff was replaced by a younger worker under the *McDonnell Douglas* scheme for a prima facie case, an employee terminated as part of RIF must show some additional evidence that age was a determining factor in his termination or that his job duties were assumed by a younger person even one within the protected class. *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir. 1994).

In this case, Inter-City terminated no one other than Mr. Serben. Mr. Serben's evidence showed that there existed a position which he in fact performed and for which he qualified at the time of his termination. Inter-City refused to keep him in

the position and instead offered it to a younger applicant within three months of terminating Mr. Serben. During that time period there was no change in the economic conditions which Inter-City claimed justified terminating Mr. Serben.

Mr. Serben, like a significant percentage of victims of employment discrimination, did not have the evidentiary benefit of a "smoking gun". Rather, his case centered on the scheme established by the Court in *McDonnell Douglas*. As in determining whether to direct a verdict, the Court of Appeals in reviewing the denial of the JAML motion was required to adopt the jury's conclusions about credibility, the weighing of evidence and inferences legitimately drawn from the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 - 255 (1986) Neither the district court nor the Court of Appeals may substitute its interpretation of the evidence for that of the jury. As the Court held in *Berry v. United States*, 312 U.S. 450, 452 - 453 (1941), the federal rules may not take away a plaintiff's constitutional right to a jury determination of the weight of evidence and jury findings on contested issues of fact. The Court of Appeals here substituted its interpretation of the evidence for that of the jury. The jury found that Mr. Serben's age was a factor in Inter-City's decision not to consider permitting Mr. Serben to remain as a sales representative.

The Court of Appeals substituted its determination of whether or not Mr. Serben's rebuttal evidence served as evidence to infer the age-animus in the termination as well as a rebuttal. The evidence, when viewed in favor of Mr. Serben, showed that Inter-City did not terminate Mr. Serben to cut costs, and that Inter-City did not even reduce its work force. Mr. Serben was a sales representative to Inter-City for ten years before Inter-City offered him employment. Mr. Serben worked as a sales representative during his tenure at Inter-City. He never assumed all of the duties of the sales management position. When Inter-City notified him of his termination, he requested to remain in the

available sales representative position. Inter-City refused. Within three months of terminating Mr. Serben, Inter-City offered the position to an applicant with less than nine months of sales representative experience. Furthermore, it delayed the start date of the new sales representative so it could state under oath to the EEOC that no new sales personnel had been hired since before Mr. Serben's termination. Inter-City acknowledged that it would always consider hiring a sales representative, even during its time of cost reductions that included the termination of Mr. Serben.

Daubert v. Merrell Dow Pharmaceuticals, Inc. , 509 U.S. ____, 113 S.Ct. 2786, 125 L.Ed.3d 469 (1993), offers no justification for the Court of Appeal's substitution of its view of the facts for those of the jury. The Court of Appeals did not determine that there was a mere scintilla of evidence from which no reasonable jury could find for Mr. Serben, rather it determined that the facts were other than Mr. Serben's evidence established and the jury believed.

The Court of Appeals raises the burden of proof for employment discrimination plaintiffs to a level which would deny recovery to all except those with a smoking gun. The burden denies a victim of the insidious sort of discrimination sought to be redressed by the ADEA the opportunity to make a case by showing that the employer's stated reason for termination was mere pretext.

CONCLUSION

For the reasons discussed here, Petitioner respectfully requests that the writ of certiorari be issued to United States Court of Appeal for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1178EMSL/No. 94-1182EMSL/No. 94-1185EMSL

Nicholas Serben,

Appellant,

vs.

Inter-City Manufacturing Co., Inc.,

Appellee.

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 7, 1994

Order Entered at the Direction of the Court
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1178EM

Nicholas Serben,
Appellant,

v.

Inter-City Manufacturing Co., Inc.,
Appellee.

No. 94-1182EM

Nicholas Serben,
Appellee,

v.

Inter-City Manufacturing Co., Inc.,
Appellant.

No. 94-1185EM

Nicholas Serben,
Appellee,

v.

Inter-City Manufacturing Co., Inc.,
Appellant.

Submitted: September 12, 1994
Filed: September 30, 1994

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge,
and BOWMAN, Circuit Judge.

PER CURIAM.

Inter-City Manufacturing Co., Inc. (Inter-City) hired Nicholas Serben for a new sales manager position when Serben was fifty-two years old. Less than one year later, following the loss of two substantial customers, Inter-City eliminated the sales manager position and terminated Serben's employment. Serben brought this age discrimination action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993), and the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. ch. 213 (Supp. 1993). A jury found Inter-City discriminated against Serben because of his age and awarded back pay, but did not award liquidated damages under the ADEA or punitive damages under the MHRA. The district court awarded Serben front pay and attorney fees. Serben appeals and Inter-City cross-appeals. We reverse on Inter-City's cross-appeal.

Inter-City contends the district court erroneously failed to grant Inter-City's renewed motion for judgment as a matter of law (JAML) after the verdict. "In reviewing a denial of a motion for a judgment as a matter of law, we must determine whether there is sufficient evidence to support a jury verdict." *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir. 1994). We focus on the ultimate factual issue: whether Inter-City intentionally discriminated against Serben because of his age. *See id.* at 800-01.

Having carefully reviewed the record in the light most favorable to Serben, *see id.*, we conclude Serben presented no direct evidence of age discrimination nor sufficient circumstantial evidence for the jury reasonably to infer Serben's age actually motivated his employer's decision. Serben was the same age when the sales manager position was eliminated and he was terminated as when he was hired. *See Lowe. v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174 (8th Cir. 1992). Serben's

mere membership in the protected class does not permit an inference of age discrimination. *See Skagen v. Sears, Roebuck & Co.*, 910 F.2d 1498, 1500 (7th Cir. 1990); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1167 (8th Cir. 1985). Serben's status as an experienced and thus higher paid employee also does not in itself permit an inference of age discrimination. *See Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1706-07 (1993) (discharge motivated by factor correlated to age, like seniority, is not age-based discrimination). Further Inter-City offer of early retirement to other protected employees does not violate the ADEA and does not support an inference of age discrimination. *See Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 255 (1st Cir. 1986). The offers were made as part of a reduction in force that included the elimination of Serben's position, and Serben concedes the early retirement plan is not evidence of discrimination against him because it was not offered to him. Finally, Inter-City's refusal to accept Serben's offer to work in a lower paid sales representative position does not show age discrimination. At the time of Serben's termination, no sales representative position was available.

Because Serben failed to make a submissible case of age discrimination, the district court erroneously denied Inter-City's JAML motion. Accordingly, we reverse without reaching the other issues raised in parties' briefs.

A true copy.

Attest:

CLERK, U.S.COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV1545 DJS (CDP)

NICHOLAS SERBEN,
Plaintiff,

vs.

INTER-CITY MANUFACTURING CO., INC.,
Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, and the jury having duly tried the issues presented to it and returned a verdict for the plaintiff, and the Court having heard the evidence and considered the equitable issues reserved to it, as discussed more fully in the Memorandum Opinion entered this same date,

It is Ordered and Adjudged that the plaintiff recover of defendant the sum of $59,464 representing back pay, and the sum of $65,211 representing front pay, for a total judgment of $124,675, with interest thereon at the rate of 3.54% as provided by law and his costs of this action.

Dated this 6th day of July, 1993.

/s/ Catherine D. Perry
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV1545 DJS (CDP)

NICHOLAS SERBEN,
Plaintiff,

vs.

INTER-CITY MANUFACTURING CO., INC.,
Defendant.

MEMORANDUM OPINION

This matter is before the Court on the various equitable issues reserved to the Court for judgment. This case was referred to the undersigned for trial and all other purposes with consent of the parties pursuant to 28 U.S.C. §636(c).

Plaintiff brought this claim against his former employer alleging age discrimination under the Age Discrimination and Employment Act ("ADEA"), 19 U.S.C. §6203 *et seq.* and the Missouri Human Rights Act ("MHRA"), §213.111, R.S.Mo. He alleges that he was wrongfully terminated on account of his age. The case was tried to a jury, which returned a verdict in favor of the plaintiff on his claim of age discrimination. The jury assessed plaintiff's actual damages to the time of trial in the amount of $59,464, and found that the defendant's conduct was not willful. Also submitted to the jury was the issue of punitive damage under the MHRA, and the jury awarded no punitive damages. Because of equitable issues reserved to the Court, no judgment was entered at the time of the verdict. Shortly after the jury's verdict was returned, the Court heard testimony on the equitable issues remaining for the Court. Specifically before the Court is the plaintiff's prayer for reinstatement or front pay.

Absent a showing of exceptional circumstances a jury verdict for the plaintiff on the issue of age discrimination is *res judicata*

for the purposes of reinstatement. *Cleverly v. Western Electric Co.*, 450 F. Supp. 507, 511 (W.D. Mo. 1978), *aff'd.* 594 F.2d 638 (8th Cir. 1979); *see also Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 280 (8th Cir. 1983), *appeal after remand*, 783 F.2d 149 (8th Cir. 1986). One exceptional circumstance which would prevent reinstatement is the lack of an available position. Where there has been a reduction in force, reinstatement is often denied. *See Coston v. Plitt Theaters, Inc.*, 831 F.2d 1321, 1331-32 (7th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988).

In this case plaintiff had initially been hired by defendant to perform a sales manager function. Plaintiff worked for defendant for only nine months, and never spent full time in management duties. When he was terminated the sales manager position was also terminated. The defendant opposes reinstating the plaintiff because the sales manager position no longer exists. The plaintiff does not strongly argue that he should be reinstated either, and both parties appear to agree that because of the size of the defendant's management staff and the fact that defendant is a small family owned and operated business, reinstatement would not be appropriate under the circumstances.

Therefore, because the sales manager position no longer exists, and because it appears that reinstatement of plaintiff into a different position would not be equitable or practical under the circumstances, the Court finds that plaintiff should not be reinstated. Front pay is an available remedy when reinstatement is not appropriate because of exceptional circumstances. *See Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1065-66 (8th Cir. 1988) (The Court may award front pay when it is necessary to fulfill the purposes of the ADEA). Here the Court finds that the back pay award of $59,464 is not sufficient to make the plaintiff whole. Accordingly, plaintiff is entitled to front pay. The Court received evidence concerning the appropriate amount of this front pay.

Plaintiff testified that when he was hired he was told he could expect long term employment. He also testified that because he is single he believed he would work beyond the age of 65, and more than likely he believed that he could work until he was 70 or older. Plaintiff presented the testimony of LeroyJ.Grossman, Ph.D., an economic expert, regarding plaintiff's calculations of the appropriate amount of front pay. Dr. Grossman calculated that plaintiff had been receiving an annual salary from defendant of $36,000, to which Professor Grossman added 4% to represent benefits received. That provided a total annual income from defendant of $38,640. Professor Grossman found that the plaintiff is currently able to earn only $18,000 per year, resulting in lost income of $20,640 per year. Based on these assumptions and finding this amount of loss per year, Professor Grossman calculated that plaintiff would lose a total of $169,398 (present value) between the time of the evidence and if he were to retire at age 65. If he were to retire at age 70, the present value of his expected future loss would be $245,613.

Defendant presented evidence, through cross-examination of Professor Grossman, that if the calculations were done based on an annual salary that plaintiff would have received from defendant in the amount of $19,500, the loss would be only approximately $3,480 per year. Projecting this to age 65 the total loss would be only $28,561, and to age 70 the total loss would be only $41,411. Defendant argues that this is the appropriate damage calculation because plaintiff provided testimony that when the sales manager position was eliminated at defendant's company he had asked that he be allowed to remain on the job performing the sales service representative duties that he had, to some extent, been performing.

The evidence relating to this issue is somewhat complicated. Plaintiff presented evidence that he in fact had been performing the duties not of a sales manager for which he was hired, but of a sales service representative, a much lower-paying job, al-

though he continued to draw the sales manager salary. Plaintiff claimed that he spent between seventy-five to ninety percent of his time performing these sales service representative duties. An important aspect of plaintiff's liability claim consisted of evidence that several months after he was terminated, the defendant hired another person to fill the sales service representative slot, despite the fact that plaintiff had asked to remain in the lower position. The person hired was paid $19,500 per year, as was the person who had previously held the sales service representative duties and whose duties plaintiff had assumed when that person left several months prior to plaintiff's termination. Thus, plaintiff himself presented evidence that although hired initially at $36,500 for the sales manger job, he really spent most of the time performing sales service representative duties, and sought to be retained in that position when he was terminated. Defendant argues that if plaintiff was willing and entitled to remain at Inter-City as a sales service representative, his annual salary entitlement was $19,500 and not $38,640.

Plaintiff then provided redirect evidence through Dr. Grossman that if the plaintiff's current earnings power is $16,000 and his highest expected salary from defendant was $19,500, the present value of his loss through age 65 would be $44,976, and through age 70 would be $65,211. The plaintiff's testimony regarding his current income indicated that he is now earning straight commissions at his current position, that he dos not believe there are any management positions available in his current business, and that because of the long period of time it took him to find his current position he does not believe he will find any other management positions. In 1992, he earned $11,500, based on straight commissions. In the first four months of 1993, January, February, March, and April, he had earned approximately $5,500. The plaintiff estimated that in 1993 he would make between $16,000 and $17,000. He believes this is the maximum wage he will be able to earn in this job.

Based on all of the foregoing evidence, the undersigned does not believe that plaintiff has shown that he would have continued to earn $36,000 per year working for defendant through age 70, even if there had been no discrimination against him. Rather, the undersigned concludes that there was sufficient evidence presented that the sales manager job was a position that the defendant would have eventually determined to eliminate in any event because it was not needed in the business. Had defendant not discriminated against, it likely would have allowed him to remain, but at the lesser salary that was paid other sales service representatives. It is simply not realistic to believe that defendant would have continued paying $36,000 for plaintiff's performance of a job for which others were paid $19,500.

The undersigned further concludes that plaintiff has presented sufficient evidence that, if he had been permitted to work as a sales service representative, he would have continued to work until age 70. Therefore, the undersigned concludes that the proper measure of the front pay to which plaintiff is entitled is the present value of the number calculated by taking the $19,500 Inter-City sales service representative salary minus plaintiff's current income. Plaintiff indicated that he expected to earn between $16,000 and $17,000 in 1993, but that this involved his working approximately a 55 hour work week. The Court therefore will accept the lower number of $16,000 as his expected current income, because the Court believes it is unrealistic to believe he would continue to work the full 55 hours a week until age 70. The Court thus finds that plaintiff is entitled to the present value of $19,500 minus $16,000, calculated until he reaches the age of 70. Dr.Grossman has calculated that this amount totals $65,211. Plaintiff is therefore entitled to a front pay award of $65,211.

The Court will enter judgment on this date awarding the back pay amount awarded by the jury, $59,464 and will award front pay in the amount of $65,211, both to draw interest at the legal

rate from today's date. No award of attorneys' fees is made at this time as defendant has reserved his right to respond to plaintiff's request for attorneys' fees within ten days after judgment pursuant to Local Rule. Plaintiff presented his evidence supporting his claim of attorney's fees in the amount of $18,633.94 at the hearing, and defendant will therefore have ten days from the date of judgment to oppose or respond to that claim for attorneys' fees. The pending claim for attorneys' fees does not affect the finality of the judgment entered on this date.

/s/ Catherine D. Perry
UNITED STATES
MAGISTRATE JUDGE

Dated this 6th day of July, 1993.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV1545 DJS (CDP)

NICHOLAS SERBEN,
Plaintiff,

vs.

INTER-CITY MANUFACTURING CO., INC.,
Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff's motion for partial new trial, to take additional testimony, to amend findings, and to amend judgement and on defendant's renewed motion for judgment as a matter of law after trial, or, in the alternative, to alter or amend the judgment. This case was referred to the undersigned for trial and all other purposes with consent of the parties pursuant to 28 U.S.C. §626(c). After a jury verdict for plaintiff on the issue of age discrimination and assessing plaintiff's damages to that point in the amount of $59,464 (and finding that the violation was not willful), the Court heard testimony on non-jury issues and entered a judgment for plaintiff for $59,464 in past damages and $65,211 in front pay.

That judgment was entered on July 6, 1993. Plaintiff's July 20, 1993 motion asks the Court to amend its findings and/or judgement under Rules 52(b), 50 and 59, Fed. R. Civ. P. Under any of the cited rules plaintiff had to file such a motion on or before July 16, 1993. Plaintiff's July 20, 1993 motion is thus not timely insofar as plaintiff seeks relief under Rules 50, 52(b) or 59.

Plaintiff also seeks relief under Rule 60(b), however. Rule 60(b) provides that:

> "on motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trail under Rule 59(b);"

Plaintiff asserts that he has the sort of new evidence contemplated under Rule 60(b) because two days after judgment was entered in this case he underwent a total right hip replacement costing $29,300. Plaintiff argues his damages should include the cost of this surgery because his insurance as an employee of defendant would have covered his surgery, but because he was fired plaintiff had to switch to a different insurer who excluded his hip condition. At trial plaintiff offered evidence of the difference in benefits but had not then, of course, incurred this expense. The jury was instructed, in the damages instruction, that if it found for plaintiff on liability it should assess monetary damages for lost benefits as well as lost salary. The only "evidence" that is new, accordingly, is the final dollar figure for plaintiff's surgery. This is not the sort of new evidence contemplated under Rule 60(b). Plaintiff's motion will therefore be denied.

Defendant has renewed its motion for judgment after trial. For the reasons set forth in the July 6, 1993, opinion this motion will be denied.

The final matter pending is defendant's motion to alter or amend judgment. Defendant contends that the jury award for back pay should be reduced from $59,464.00 to $17,746.00. Defendant reaches this number by taking a $19,500 annual salary and calculating how much plaintiff would have made at that salary between February 20, 1991 (plaintiff's termination date) and April 9, 1993 (the date of the jury verdict). This amounts to $41,614.00. Defendant then deducted from this total all the wages plaintiff earned between February 20, 1991 and

April 9, 1993, or $23,868.00, for a total of $17,746.00. The problem with defendant's argument is that the jury had all this information at its disposal, and more (including limited information regarding plaintiff's change in health insurance) and the jury found that plaintiff's actual damages exceeded $17,746.00. While it is true that the $59,464.00 figure may have largely represented back pay, the jury was permitted to reach this figure in any number of ways that were supported by the evidence.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion for partial new trial, to take additional testimony, to amend findings, and to amend judgment is denied.

IT IS FURTHER ORDERED that defendant's renewed motion for judgment as a matter of law after trial, or, in the alternative, to alter or amend the judgment, is denied.

/s/ Catherine D. Perry
UNITED STATES
MAGISTRATE JUDGE

Dated this 7th day of October, 1993.

Supreme Court, U.S.
FILED
MAR 3 1995
OFFICE OF THE CLERK

No. 94-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NICHOLAS SERBEN,
Petitioner,

v.

INTER-CITY MANUFACTURING CO., INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED BY PETITIONER

1. When an employer offers employment to an applicant to replace a discrimination claimant three months after terminating the claimant, may that offer of employment serve to satisfy the element of the *McDonnell Douglas v. Green* scheme for making a prima facie case that the claimant show that he/she was replaced by a younger worker. (sic)

2. When a plaintiff denies that his employment was terminated because of a reduction in force (RIF), produces evidence that the total number of employees did not change, presents evidence proving the traditional elements of a prima facie case and presents credible evidence that the stated reason for termination was mere pretext, fabrication and untruthful, may the court nonetheless require the additional showing of specific direct or circumstantial evidence that age was a determining factor, which is required in RIF case, in order to submit the case to the jury. (sic)

LIST OF PARTIES

Nicholas Serben, Petitioner, is an individual residing in the State of Missouri. Respondent, Inter-City Manufacturing Co., Inc., is a Missouri corporation with its principal place of business in St. Louis, Missouri.

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Respondent, Inter-City Manufacturing Co., Inc. respectfully requests that the Court deny the Petition for a Writ of Certiorari requested herein.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 36 F.3d 765 (8th Cir. 1994) and is reproduced in Petitioner's Appendix (hereinafter "Pt. App.") at pages A-2 through A-4.

The memoranda decisions of the United States District Court for the Eastern District of Missouri (Perry, U.S.M.J.) have not been reported. They are reproduced in Petitioner's Appendix at pages A-5 through A-11.

JURISDICTION

This Court has jurisdiction to review the judgment dated September 30, 1994 of the Eighth Circuit Court of Appeals by a Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

The Eighth Circuit Court of Appeals had jurisdiction over the appeal from the judgment of the United States Magistrate pursuant to 28 U.S.C. §636(c)(1-3) and 28 U.S.C. §1291. The United States Magistrate tried the case below by consent of the parties pursuant to 28 U.S.C. §636(c)(1). The District Court below had jurisdiction of this claim of violation of the Age Discrimination in Employment Act (ADEA) (29 U.S.C. §621, *et seq.*) pursuant to 28 U.S.C. §1331.

STATEMENT OF THE CASE

Petitioner alleged that his termination was because of his age in violation of the ADEA. The undisputed facts in this case are that Petitioner, when 52 years old, was hired for a new Sales Manager position. Within a few months of his hire, Respondent lost two very large customers, the expected revenue from which was 1.2 million dollars. Petitioner then put together a sales revenue forecast for the fiscal year beginning November 1, 1990, which predicted favorable results despite the loss of the two large customers. However, two months into the fiscal year, it became apparent that Petitioner's projections would not be met. Respondent began certain cost-saving steps. Respondent concluded that it could do without a Sales Manager position and return to having certain top officers of the company perform those duties as they had before the creation of the Sales Manager position and the hiring of Petitioner. The Sales Manager position was completely

eliminated. The Sales Manager position was never reinstituted. Petitioner was the same age when he was terminated as when he was hired.[1]

During the period of time when Respondent was attempting to cut costs, Petitioner chose not to replace one of Petitioner's subordinate *sales (customer) service* representatives. Petitioner claims to have taken on some of that employee's responsibilities. That position, according to Petitioner himself, due to the business conditions then prevailing, remained open at the time of Petitioner's discharge. The Petition herein incorrectly leads the Court to believe that, at the time of Petitioner's termination, Respondent had a sales (customer) service position open for which it was seeking applications. Petitioner's own testimony at trial was that, at the time of his termination, Respondent was not looking to fill the sales (customer) service position due to the economic conditions which still prevailed. Thus, Petitioner's Sales Manager position was eliminated and there was no sales (customer) service position to be filled at the time of his discharge. Likewise, the Petition herein incorrectly states that Respondent offered the sales (customer) service position to a younger applicant at the same time that Respondent informed Petitioner that he was being terminated. Contrary to the statement of the Petitioner herein, there was a reduction in the workforce. Petitioner's Sales Manager position was completely eliminated and never reinstituted. A sales (customer) service representative who had resigned had not been replaced. The total number of employees of the Respondent may have fluctuated from time to time. However, that Petitioner's position was eliminated cannot be disputed.

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[1] Petitioner incorrectly suggests that Petitioner was, at the time of his discharge, merely training for the Sales Manager position. While he may not have assumed the full complement of duties, he came with numerous years of sales manager experience in the industry. He was not a trainee.

While the jury found in favor of Petitioner and the District Court overruled Respondent's Motion for Judgment as a matter of law, the United States Court of Appeals for the Eighth Circuit reversed the judgment outright concluding that Petitioner "presented no direct evidence of age discrimination nor sufficient circumstantial evidence from which the jury could reasonably infer that Petitioner's age actually motivated his employer's decision." (Pt. App. A-3). *Serben v. Inter-City Manufacturing Co., Inc.*, 36 F.3d 765 (8th Cir. 1994).

SUMMARY OF ARGUMENT

This is not a case appropriate for the granting of a Writ of Certiorari. No inference of discrimination can flow from an employer's refusal to offer a terminated employee a position which is not open at the time of his termination. Moreover, a terminated employee cannot establish that he was replaced by a younger employee for purposes of establishing a *prima facie* case under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) by showing that an employer did not hire him into a different position which did not become open until months after the employee was terminated. The Eighth Circuit did not impose a more stringent burden of proof on Petitioner when it required Petitioner to produce evidence of the age discrimination.

REASONS FOR DENYING THE PETITION FOR A WRIT

Rule 10 of the Rules of the Supreme Court of the United States provides that "[A] petition for a writ of certiorari will be granted *only when there are special and important reasons therefor.*" Petitioner does not suggest that the decision of the Eighth Circuit Court of Appeals conflicts with any decision of this Court or that of any other circuit. Petitioner does not suggest that the decision of the Eighth Circuit Court of Appeals deviates from the accepted and usual course of proceedings. In sum, there is nothing special or far-reaching about the decision of the Eighth Circuit which would justify the consideration of this Court.

I. Response to Point I that Petitioner was Replaced by a Younger Employee as Required by *McDonnell Douglas v. Green*

Contrary to the assertions of Petitioner, the evidence did not show that he was replaced by a younger worker. The undisputed facts are that Petitioner was hired to be the Sales Manager with a $36,000.00 per year salary. Contrary to the impression that Petitioner attempts to paint in this Petition, Petitioner had many years of sales management experience in related industries before being hired by Respondent. There was no training period. When the very large customers were lost shortly after his arrival, a sales (customer) service representative (salary $19,500.00 annually) in Petitioner's sales organization resigned and was not replaced in an effort to cut costs. The resigned sales (customer) service representative's duties were spread among several other employees, including Petitioner. Economic conditions, according to Petitioner, did not warrant the hiring of a replacement at that time. Those same conditions prevailed when Petitioner's Sales Manager position was subsequently eliminated. Petitioner's Sales Manager position remains unfilled. Some months after Petitioner's discharge, another sales (customer) service repre-

sentative was hired. Petitioner, contrary to his representations in his Petition herein, has never been replaced.

Assuming *arguendo* that Petitioner did prove the "replaced by a younger employee" element of the *McDonnell Douglas* formula (which he did not), the Eighth Circuit's opinion remains correct. The Eighth Circuit determined that Petitioner did not produce evidence that Petitioner's age motivated Respondent's decision to discharge Petitioner. (Pt. App. A-3, A-4). An age discrimination claimant must show that age discrimination *vel non* was the cause of his discharge. *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1706-07 (1993). Even if Petitioner did make a *prima facie* case under *McDonnell Douglas* (which he did not), that is only the beginning of the analysis, not the end. The ultimate question is age discrimination. *Id.* The Eighth Circuit, "[h]aving carefully reviewed the record in the light most favorable to Serben" [Petitioner] concluded that Petitioner "presented no direct evidence of age discrimination nor sufficient circumstantial evidence for the jury reasonably to infer Serben's age actually motivated his employer's decision." (Pt. App. A-3).

The thrust of Petitioner's argument to the jury in this case was that age discrimination could be inferred because Petitioner was within the protected age group and that Respondent knew it would save money by letting an older person go. Petitioner relied heavily on the so-called "age proxy" theory of *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987), which was subsequently specifically repudiated by this Court in *Hazen Paper Co. v. Biggins*, *supra*. All other matters offered by Petitioner were found by the Eighth Circuit to be inadequate to establish an inference of age animus. (Pt. App. A-3).

The essence of the Petition herein is to ask the Court to scour the volumes of trial evidence to determine if there was something that might support an inference of age animus. The Eighth Circuit has done so and Petitioner's case was found lacking. This

is not the type of case for consideration by the Supreme Court of the United States.

II. Response to Point II that the Eighth Circuit Imposed an Improper Burden of Proof on Petitioner

In his second point, Petitioner seems to suggest that the Eighth Circuit imposed a burden of proof on Petitioner which is not authorized by the ADEA. Such is not the case. The Eighth Circuit opinion applied the correct burden of proof. In its opinion, the Eighth Circuit clearly cut through to the most basic question - "We focus on the ultimate factual issue: whether Inter-City [Respondent] intentionally discriminated against Serben because of his age." (Pt. App. A-3). This Court has made it abundantly clear that such is the proper burden of proof and ultimate issue in any discrimination case. *Hazen Paper Co. v. Biggins, supra*; *St.Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). The real complaint of Petitioner is that the Eighth Circuit, after having carefully reviewed the record, found no direct evidence and insufficient circumstantial evidence from which a reasonable jury could find age discrimination. Again, what Petitioner seeks herein is to have the Court review the whole record in this case to determine whether it believes that a reasonable jury could find that age animus was the motivation for Petitioner's termination. The Eighth Circuit has performed that task. This is not the task of the Supreme Court of the United States.[2]

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[2] Once more, Petitioner's characterization of the evidence concerning Petitioner's position with the Respondent is not in accord with the record. Petitioner was hired to be the Sales Manager, not a subordinate customer service representative. The Sales Manager position was never reinstituted. It was abolished.

CONCLUSION

This case is not one appropriate for review by this Court. It does not present an issue of any special importance. Moreover, the Eighth Circuit Court of Appeals correctly applied the law. The Eighth Circuit properly determined that Petitioner had failed to produce evidence sufficient for a reasonable jury to determine that Petitioner's discharge was because of his age. Therefore, the Petition for a Writ should be denied.

Respectfully submitted,

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